



City of Carmel

Carmel Advisory Board of Zoning Appeals Regular Meeting Monday, November 22, 2004

The regularly scheduled meeting of the Carmel Board of Zoning Appeals met at 7:00 PM on Monday, November 22, 2004, in the Council Chambers of City Hall, Carmel, Indiana. The meeting opened with the Pledge of Allegiance.

Members in attendance were Leo Dierckman, James Hawkins, Earlene Plavchak, Madeleine Torres and Charles Weinkauf, thereby establishing a quorum. Jon Dobosiewicz, Angie Conn and Mike Hollibaugh represented the Department of Community Services. John Molitor, Legal Counsel, was also present.

Mr. Dierckman moved to approve the minutes of the October 25, 2004 meeting, as submitted. The motion was seconded by Mr. Hawkins and **APPROVED 5-0.**

Mr. Dierckman moved to approve the minutes of the October 13, 2004 special meeting, as submitted. The motion was seconded by Mr. Hawkins and **APPROVED 5-0.**

Mrs. Conn gave the Department Report. The December BZA Hearing Officer and Regular meetings will be Monday, December 13, 2004.

Mr. Molitor, Legal Counsel, had nothing to report.

H. Public Hearing.

1-10h. TABLED ~~116th/Keystone Retail Shops~~

The applicant seeks the following development standards variances:

Docket No. 04080027 V — Chapter 14.04.02 — 60 ft front yard

Docket No. 04080028 V — Chapter 14.04.03 — 30 ft side yard

Docket No. 04080029 V — Chapter 14.04.05 — 30 ft rear yard

Docket No. 04080030 V — Chapter 14.04.09 — 80% lot coverage

Docket No. 04080031 V — Chapter 14.06 — 30 ft greenbelt adjacent to residence

Docket No. 04080032 V — Chapter 23A.02 — 120 ft front yard from US 431 R/W

Docket No. 04080033 V — Chapter 23A.03 — 30 ft greenbelt along US 431

Docket No. 04080034 V — Chapter 23A.04 — parking prohibited in greenbelt

Docket No. 04080035 V — Chapter 25.07.02 9(b) number of signs

Docket No. 04080036 V — Chapter 26.04.05 — buffer yards

The site is located at the northeast corner of 116th St. and Keystone Ave.

The site is zoned B-3/Business within the US 431 Overlay.

Filed by Steve Hardin of Bingham McHale for Eclipse Real Estate, Inc.

11-15h. TABLED: ~~Companion Animal Hospital~~

~~Applicant seeks use variance & development standards variance approvals for veterinary hospital.~~

~~Docket No. 04090009 UV Chapter 19.01 permitted uses~~

~~Docket No. 04090010 V Chapter 27.05 number of parking spaces~~

~~Docket No. 04090023 V Chapter 26.04.05 buffer yard requirements~~

~~Docket No. 04090024 V Chapter 19.04.03 side yard setbacks~~

~~Docket No. 04090025 V Chapter 19.04.02 front yard setback~~

~~The site is located at 1425 S Range Line Rd and is zoned B-8/Business.~~

~~Filed by Jim Shinaver of Nelson & Frankenberger for Dr. Buzzetti.~~

16-21h. Kentucky Fried Chicken/Long John Silver's

The applicant seeks development standards variances:

Docket No. 04100007 V Chapter 26.04.05 buffer yard requirements

Docket No. 04100008 V Chapter 19.06 30-ft greenbelt

Docket No. 04100009 V Chapter 25.07.02-09.b number of signs & type

Docket No. 04100010 V Chapter 25.07.05 menu board area, height & number

Docket No. 04100013 V Chapter 19.04.02 front yard setback

Docket No. 04100015 V Chapter 25.07.02-09.e ground sign setback

The site is located at 1331 S Range Line Rd. The site is zoned B-8/Business.

Filed by Ryan Oyster of the GPD Group.

Present for the Petitioner: Ryan Oyster, GPD Group, 520 S. Main Street, Akron, OH. He gave project background. The existing building will be demolished and a new one constructed on the site. Site plans were shown. The new building will be closer to the right-of-way line to conform to the Range Line Road Overlay. A significant amount of greenspace with landscaping will be added on each side and along the back. They are proposing 35 parking spaces which meet the requirement. Hopefully, Long John Silver's will be part of this multi-brand building in six months to a year. It will be a red brick building with a pitched shingle roof. The required rear bufferyard is 20 feet; currently it is zero and will be increased to ten feet. The greenbelt will be ten feet with landscaping approved by the Urban Forester. He wanted to go ahead and get approval for the signage including Long John Silver's so they would be able to install them when Long John Silver's comes into the building. They requested blade signs on the front of the building for KFC and Long John Silver's. Only the KFC sign would be installed at this time. Both signs are eighteen square feet. The menu boards need to be larger than the sixteen square feet which are permitted. At this time a smaller menu board would be installed until Long John Silver's joins the building. They are also requesting a preview board to expedite the ordering process. The front yard variance is to comply with the City's request to move the building forward. The sign variance is needed so that the signs will be visible.

Members of the public were invited to speak in favor or opposition to the petition: no one appeared.

Mrs. Conn gave the Department Report. The Petitioner has worked hard with the Department and the Plan Commission in regards to the site layout and building design to comply with the proposed Carmel Drive Range Line/Road Overlay. The Development Plan and the ADLS were approved by the Plan Commission. The Department recommends positive consideration of all Dockets.

Mr. Weinkauff wanted clarification regarding asking for something that is not certain. If Long John Silver's does not become a part of the building, then the requests are not needed.

Mr. Dobosiewicz stated that the one modification that could be made would be that the Petitioner could amend their petition that the second blade not be installed and the menu board would be a reduced size or that the Board approve the variances subject to the occupation of the site by two separate tenants.

Mr. Weinkauff was more concerned about the size of the monument sign.

Mr. Dobosiewicz stated that the building and the kitchen area would be constructed to accommodate two separate tenants. This particular ground sign meets the size of the Ordinance, so it is not larger than what would be permitted for a single tenant.

Mr. Hawkins wanted details of the landscaping from the building rendering.

Mr. Oyster stated the rendering was correct, per the plans.

Mr. Molitor stated that the dockets could be voted on in one motion.

Mr. Dierckman moved to approve **Dockets 04100007 through 04100010, 04100013, 04100015, Kentucky Fried Chicken/Long John Silver's**. The motion was seconded by Mrs. Torres. The Public Hearing was closed. The motion was **APPROVED 5-0**.

22-24h. TABLED: ~~O'Malia Fireplace Shop Expansion~~

~~The applicant seeks the following development standards variances:~~

~~**Docket No. 04100017 V** Chapter 12.04.02 front yard setback~~

~~**Docket No. 04100018 V** Chapter 27.03.02 no curbed parking~~

~~The site is located at 220 S Range Line Rd. The site is zoned B-1/Business.~~

~~Filed by Paul Reis of Drewry Simmons Pitts & Vornehm for the Helen J. O'Malia Trust.~~

25h. Parkwood Crossing East - Smith Barney

The applicant seeks the following development standards variance:

Docket No. 04100028 V PUD Ordinance Z-362-01; Chapter 4.7.B.3 Lower Level Sign

The site is located at 800 East 96th Street. The site is zoned PUD/Planned Unit Development. Filed by Blair Carmosino of Duke Realty Limited Partnership.

Present for the Petitioner: Steve Granner, Zoning Consultant for Bose, McKinney & Evans, 600 E. 96th Street, Suite 500. Tim Hall, Duke Realty, was also present. The PUD allows up to six lower level signs. The Special Study Committee recommended approval of the signs. The blue sign was changed at committee to a black sign to be consistent with the two existing signs on the north façade of the building. They are day/night signs. They are black during the day and the illumination at night changes them to white/off-white. The existing signs have a cream/off-white background. This sign will be all black and is for westbound traffic on US 465. Within the Ordinance, these signs are called lower level

signs and by standard were to be no higher than 26 feet above grade. This sign needs to be 29 feet above grade or it would be in front of the windows. There is no practical position which is lower on the building.

Members of the public were invited to speak in favor: no one appeared.

Opposition:

Janet Cox, 9540 Broadway Street. She wanted to clarify location and illumination of the sign. She stated that Duke had agreed that there would be no signs facing 96th Street between Meridian and College; the signs would all face US 465. If this change is allowed, what will happen with the next building?

Rebuttal:

Mr. Granner clarified that there are three different Parkwood Developments. The original Parkwood is between College Avenue on the east and Pennsylvania Avenue on the west on the north side of 96th Street. That is the development that Mr. & Mrs. Cox were in attendance for the sign variances. Parkwood West, which is not developed, is from Meridian over to Springmill on the north side of 96th Street. That particular PUD rezoning did allow something different from the existing Parkwood. It allowed lower level signs on the future buildings. Similar language was used in the rezoning of this site which is on the east side of College. It does not come all the way to College because of the existing commercial building. So, they are not changing anything within this PUD. They are asking for the additional three feet above grade. The east side of the building sort of faces US 465. All the signs approved in the existing Parkwood have been on the north side, with one exception which is on the west façade toward US 31 on Building #One. Mr. and Mrs. Cox will receive Public Notice for the next signs on Building #Two and anything else in the existing Parkwood.

Mrs. Conn gave the Department Report. According to the PUD, a sign is allowed on the east façade. This variance is a height variance and the Department recommends favorable consideration.

Mr. Weinkauff stated that he hoped Mrs. Cox's questions had been answered. (She indicated "No".) Mr. Weinkauff stated that the original development still has the rules in place that were part of the petitions at several different times before this Board. As the Department stated, the signage on the east side of Parkwood East is allowed and the variance is for the height.

Mr. Dierckman asked to see a site plan showing the location of this building in relation to the other projects.

Mr. Granner indicated the site plan for this site was under Tab 3 in the packet. Parkwood Eight is the only building that is constructed. It runs lengthwise east and west. Under Tab 2 was the zoning map showing Parkwood East and the existing Parkwood and Parkwood West. Both Parkwood West and East have PUD zoning.

Mr. Dierckman wanted to know if there were homes directly across from this sign.

Mr. Granner stated that there are a couple apartment complexes across the street and there are a couple of homes back in the woods closer to College.

Mr. Weinkauff asked Mrs. Cox to answer as to the location of the homes.

Mrs. Cox stated that there are two residences south of this location. Her concern was that once one thing happened there would be something else. Mr. Carmosino met with them when the original homes were torn down to build the one building and then another. They were promised verbally at that time that there would not be any signs facing 96th Street east or west, they would all face US 465. Once something is started and OK'd, what would be next? When the leaves are down, those who live on College, Broadway and Park could see a lighted sign. Not this one particularly, but if the next proposed one is facing west, they would be able to see it. They have lived in their home over 40 years, long before Duke. She requested a negative vote and let the sign face US 465.

Mr. Weinkauff clarified that this Board is not a precedent-setting body. If they allow this variance, it does not set the "wheels in motion" to allow future signs to face in other directions. He did not have a great deal of concern about the location and illumination of this sign, but wondered why the sign couldn't face US 465 instead of facing east.

Mr. Granner stated that the building is allowed two signs, one facing 96th Street and one facing US 465. The one facing 96th Street was moved to the north side. The lower level signs are not permitted on the north side, but only on the east, south or west façade. Trying to stay true to the PUD Ordinance, they are trying to put the sign on the side permitted by the Ordinance, but could not meet the 26 feet. He did receive a call from one of the two homeowners on the south side of 96th Street that received a Public Notice regarding the placement of the sign. They had no problem with the east façade placement.

Mrs. Cox asked if he had told them it was lighted.

Mr. Granner did not recall.

Mr. Weinkauff stated that the sign is allowed by Ordinance set by the Plan Commission and City Council. This Board's responsibility was just to approve the variance in height.

Mr. Hawkins moved to approve **Docket 04100028 V, Parkwood Crossing East – Smith Barney**. The motion was seconded by Mrs. Torres. The Public Hearing was closed. Mr. Dierckman asked about the light intensity and placement. Mr. Granner stated it would be the same as the existing signs. The same specs were used and the three feet keeps it from being in front of a window. The motion was **APPROVED 5-0**.

I. Old Business.

1h. Martin Marietta Materials - Mueller Property South

The petitioner seeks special use approval for a sand and gravel extraction operation.

Docket No. 04040024 SU Chapter 5.02.02 special use in the S-1 zone

The site is located at the southwest corner of the intersection of East 106th Street and Hazel Dell Parkway. The site is zoned S-1/Residence - Low Density.

Filed by John Tiberi of Martin Marietta Materials, Inc.

Mr. Weinkauff wanted either the Department or Legal Counsel to refresh the Board and everyone exactly where this Petition stands at this time after the many meetings and what would and would not be allowed this evening.

Mr. Dobosiewicz called the Board's attention to the letter dated November 15, 2004 from Phil Thrasher and distributed last week with the Department Report. This evening at the dais was a document very similar excluding the first two pages and the cover letter, as well as a letter from Bill McEvoy. The Department was asking if the Board was going to take those additional items from the public into consideration. At the meeting on October 25, the Board indicated that the Public Hearing portion was over and the Board was only going to consider modifications to the Commitments as discussed by the Department.

Mr. Molitor stated that the Board has the authority to reopen the Public Hearing. It would require a motion to accept these materials received after the deadline in order to place them into the record.

Mr. Weinkauff stated that since they already had the material from Mr. Thrasher in their possession and these looked very similar, he did not see any harm in them.

Mr. Molitor stated that as he understood it, there may be two small changes from the material that was previously submitted. It may be helpful to the Board if Mr. Thrasher described those changes briefly. That would be up to the Chair.

Mr. Weinkauff asked Mr. Thrasher to tell them the two differences.

Mr. Thrasher stated that he believed they were on page 4, paragraphs 3 and 4. The third line in paragraph 3, the words "limestone extraction" are new and are based on a review of the videotape today. Otherwise, it was a pretty fair statement of what was agreed to last month. Page 4, paragraph 3, number 3, "mining" was changed to "limestone extraction". Paragraph 4 came to mind recently. It was indicative of one of the motivations for opposing this petition. They are concerned that if the application was approved in advance of approval by the Common Council of an appropriate mining ordinance, that the approval by the Common Council's changes would not be effective on this property due to the concept of Legal Non-Conforming Use. If it was approved today, then they would be able to operate under today's laws as they stand and there are none. So in the future if a mining ordinance were adopted, it would not apply to this operation. Paragraph 4 was asking that they waive that defense.

Mr. Weinkauff stated that if this document was accepted into public record, it was just something for their consideration in any type of Commitments that would be put together, if they approved the petition.

Mrs. Plavchak moved to allow the letter from William D. McEvoy, President of Kingswood Homeowners Association along with Commitments they would like to see added as a part of **Docket 04040024SU**. The motion was seconded by Mrs. Torres and **APPROVED**.

Mr. Weinkauff asked for direction from Legal Counsel or the Department on how to proceed.

Mr. Molitor responded that the last meeting ended with the discussion that the Petitioner would meet

with the Department. The Department would also allow the Remonstrators to meet with them to get their opinion on the proposed Commitments. As he understood it, there were four sets of Commitments before the Board. The lofty goal at the last meeting, to have one document for consideration, had not been met. The Department may be able to shed some light on how this came to pass. Ordinarily the Board would be able to proceed to a vote on this matter. With this being a fairly complex matter, it was not as cut and dried or simple as most cases. The Board could go ahead and take a vote based on one set of Commitments as articulated in a motion that could be made by any member. The Rules do not specifically allow for a motion to disapprove. The Board would need to suspend the rules to allow for such a motion. The Rules do allow for the Chair to appoint a committee to assist in the undertaking of the duties of the BZA. The Chair might want to consider appointing a committee of two members of the BZA to meet with the Department and perhaps with the Petitioner to come up with a single set of Commitments for the Board's consideration. That could be possible before the December 13 meeting.

Mr. Weinkauff asked if the Board was to waive the Rules to make a motion in the negative and that motion carried, then the determination of the Board would be quite clear and they would not have to go through the process of making a motion in the positive with all the Commitments.

Mr. Molitor stated that if a motion was made to suspend the rules in that regard, that wouldn't require someone to make a motion in the negative, it would just allow it to occur. That might be a way to test whether the Board would like to have that option.

Mr. Weinkauff wanted clarification on the proposed Commitments received from the Petitioner, proposed Commitments as amended by the Department, and the proposed Commitments from the Remonstrators.

Mr. Dobosiewicz distributed a document illustrating the differences between the proposed Commitments as amended by the Department and the proposed Commitments provided by the applicant. The last two pages are comments and recommendations that Mr. Molitor had put together. From a previous draft on the comments and recommendations from John Molitor, the end of the first line replacing Paragraphs 10B and C in the draft should refer to 12 B and C in the draft that the Board had. Prior to items 3 and 4 in his comments and recommendations, Paragraph 9 regarding binding effect should read Paragraph 11. They are comments based on the same requirements, they are just from a previous version. The version that the Board had in front of them was presented last week by the Department under a single page that indicated proposed Commitments as presented by the applicant. Items 12 B and C and the 11 chapters, as indicated, were where those recommendations came from. The Commitments that were provided by the Remonstrators, as indicated by Mr. Thrasher, have two modifications from what was presented to the Board for consideration in the packet last week. It was the Department's position that Item A, Commitments relating to water quality would be 1 through 11. In our discussions with the Water Utility, they have indicated that the Commitments that have been made by Martin Marietta are satisfactory. While there may be validity to Items 1 through 11, unless the Board felt that one or more of these should be added, what the Department was looking for was a response from the Utility Department that the discussions and agreements that they had reached were satisfactory. Those were referenced in the Commitments that were provided by the applicant, Items 1 through 11. The second was with regard to Commitments regarding use of real estate, Item 1. He was reading from the Commitments submitted by Mr. Thrasher. They were not titled as such but read Commitments Docket #04040024 SU. It was information that was presented this evening that was amended from what was presented last week. He read from the bottom of Page 3

“that mining at the real estate, including removal of overburden, storage materials and transportation materials shall be done in accordance with performance standards set in Carmel City Code Chapter 20B, M-1 Manufacturing District.” It was not the recommendation of the Department that the Board adopt that condition. Conditions # 2 and 3, the Department believed were addressed within their proposed Commitments. Item 4 was further addressed in Mr. Molitor’s Commitments. Item #5 they believed that language was within the Ordinance regarding that. Item #6 was one that was in need of some discussion. It reads that “the covenanters shall relocate the existing Carmel Sand Plant presently located on the west side of Hazel Dell Parkway.” Currently there is litigation concerning the location of that plant whereby the Board denied the application made by the Petitioner for relocation of the plant. The Department did not feel it was appropriate to condition this approval with the relocation of a plant that the Petitioner had previously asked to relocate and was denied by the Board. That was up to the Board’s consideration and they may want to ask Mr. Thrasher more questions whereby he had selected to include that. Item #7 basically states that the Petitioner can conduct the activity as they propose but they would look at other means that would not cause as much traffic increase, such as conveyor belts or water slurry. Ultimately that would be up to the decision of the Department. The Petition, as stands, was requesting the aggregate be transported by truck. If there was a petition on Mueller North and they were able to convey materials from Mueller South onto Mueller North and then to the processing plant via some other means, that would be a discussion related to Mueller North. Item #8 on the top of page 5 was addressed through the Commitments. The Department does not have a problem with the Commitment in Item #9 and it was something the Board could discuss. Item #10 was addressed through the Commitments with the application as proposed by the applicant. The Board may want Mr. Molitor to look at the language because it contains a lot of specificity into the financial security. The Department was comfortable with the language as it was proposed. Item #11 was similar to the Department thoughts on #10. There was no need for Item #12; it was all spelled out within the existing application with the exception not to include the portion at the top of page 6 reading: “no substantial deviation from such plans shall be permitted without the granting of a variance by the BZA following notice”. That suggests that the Board would allow a Special Use and not permit any changes unless a variance was reviewed by the Board. That was not consistent with any other Board practices. If a modification was made that was outside the application that was presented, the Department would require that the Petitioner seek Board review under an amended Special Use application. Items #13, #14 and #15 were addressed within the recommendations the Department had made in changes to the Applicant’s Commitments. Item #16 was requesting a copy of the current lease between E & H Mueller Development and Martin Marietta. If the Board sees that it needs to have a copy of that lease to respond to or to take final action, that will be left to the Board’s discretion. Items #17 and #18 are both something Mr. Molitor could review and offer insight. They are already included within the Petitioner’s Proposed Commitments. Going back to Proposed Commitments as amended by DOCS which was delivered last week, the Department took the Proposed Commitments provided by the applicant and outlined within that information the changes the Department would like to see. The highlights for those three were contained within the document he had given the Board. The Department was requesting that they add the following after Item 1D with regard to hours of operation at the existing sand plant. The Petitioner has agreed to modify backup alarms at that location consistent with what they are doing with this application. The Department would like the hours of operation to be consistent with Mueller South. The Department understands that the Petitioner was unwilling to modify their Commitments with that regard. Item #2 was the section entitled Host Fee. This was an area that was discussed at the last meeting with regard to an impact fee of \$50,000 per year associated with the sand and gravel. Item 3 would be to submit a complete Exhibit B. The Commitments do not a master list of maps and submittals. He thought the Petitioner had a copy this evening for the Board’s

use. He felt he had gone over all the information that had been submitted to the Board to-date. He covered the areas where the Department varied from the Petitioner as well as gave some insight as to how the Department utilized the Commitments that were proposed by the Remonstrators. There were two other items that were not mentioned that had been provided to the Board for their consideration. Those included Martin Marietta's proposed Findings of Fact and conclusion of law that were submitted to the Board at the last meeting, as well as the Remonstrator's proposed Findings of Fact. To expand on the comments that were made by Mr. Molitor and Mr. Weinkauff, if it was the intent of the Board members not to grant approval of this petition, it might be appropriate to suspend the Rules and make a motion in the negative. That would avoid the need to iron out or add to any Commitments. If that motion failed, there would be a need to amend or finalize the Commitments. If the Board was not going to vote to deny the petition, then they were going to vote to adopt it subject to some variation of one of these three sets of Commitments.

Mr. Weinkauff wanted clarification on a negative motion. If a negative motion was defeated, then the Board would come back and look at another motion with a Set of Commitments. Even in that case a Board member would not necessarily be required to vote for a motion in favor of a petition.

Mr. Weinkauff asked for a motion to suspend the Rules to allow for a vote in the negative. Due to the lack of a motion, the Rules were not suspended.

Mr. Dierckman suggested the Board decide on one Set of Commitments to work from. Seeing that the Department had taken the Commitments from the Petitioner and incorporated their concerns and some of the ones made at the last meeting, those should be the Commitments to start with.

Mr. Dobosiewicz stated that the only thing not included in the Department or Petitioner's Commitments was the dollar figure that was discussed, because they were different.

Mr. Dierckman wanted to start with the Department's version of the Commitments and get feedback from the Petitioner. They had seen the feedback from the Remonstrators.

Zeff Weiss, attorney, 3400 One American Square, Indianapolis, counsel to Martin Marietta Materials, Inc. along with Wayne Phears. He agreed that was a reasonable way to proceed. He distributed three applicable documents that were their Proposed Commitments, the Department's Proposed Commitments, and the Findings of Fact with a ballot.

Mr. Dierckman asked Mr. Weiss to work from the Department's document that was already in the Board's possession because they had had time to work with it and make their own notes over the weekend.

Mr. Weiss felt they had addressed all issues that were raised at the last meeting in a positive format. The only thing that separated them from the Department was highlighted in a document handed out by Mr. Dobosiewicz. There were only two issues. For the first time the Department had suggested that they somehow wrap into this petition the sand plant that was voted on in the Yedlick appeal. That had never been a part of this petition or application or any of the evidence that came in. Item #1D was an attempt to wrap in a property that was not subject to this petition before the Board. On that basis, the Petitioner rejected it because it had nothing to do with this application. That was the request of the Department to limit the hours of operation of the Carmel Sand Plant. The second item was a host fee.

In 2B the Department ask for \$1,000,000 per year for each year of this application/permit without regard to anything. He did not see that in the Ordinance and the Petitioner respectfully declined to pay \$1,000,000 per year when there was no basis in law, ordinance or reasonable fact to justify it. He stated that he could go through each item for which the Department was going to spend the money. Item #1 was to pay the expense for review; that was part of the application fee that had already been paid. With regard to expenses to design and construct repairs, there was no evidence that any of this needed to be done. At the last meeting they indicated that they were willing to pay whatever a reasonable amount would be for any damage, if there was any. There was no evidence that something needed to be redesigned. It was also suggested last time that the Petitioner would reconfigure ingress and egress to minimize any impact. In #3 the City was asking the Petitioner to pay legal fees. In the past the City has borne the legal fees in defending itself. Number 4 was a request for monitoring past expenses. They had indicated they would pay for all reasonable monitoring expenses of the operations. But it was not justifiable to ask them to go back and pay for expenses incurred by the City in the ordinary course of business. Items set forth in B, C and D relate to things that might happen if they do not pay the fee on a timely basis. Because there was no reason or justification for the fee, he would not address those. Item E was about the number of days of extraction and processing operation and he did not see the relevance, unless it was about conducting business outside the hours of operation.

Mr. Dierckman wanted clarification on Item 2A5, the expenses as determined by the Director for monitoring off-site impact.

Mr. Weiss believed they had indicated in their Commitments that they would pay for off-site monitoring. He thought it was an attempt to booster up into the \$1,000,000. Some of this they had agreed to pay for in their Commitments. This was either in addition or to justify the \$1,000,000. He felt he could summarize by saying there was no authority to request of Martin Marietta or any other citizen of the City of Carmel, a host fee, a tax, or an impact fee that was not authorized by the Ordinance. He suggested Mr. Molitor should be consulted. With the exception of these two provisions, they had agreed to everything that the City requested. When they submitted their Commitments last week, these were not requested at that time. They believed their version that was submitted was complete. There had been some suggestion from the Department about a fee or tax, but this amount was new. He suggested the Board vote favorably for the application, based upon the Statement of Commitments they had provided. They were responsive to each and every one of concerns that were raised by the Board or staff at the last meeting. They believed them to be fair and just.

Mr. Dierckman stated that at the last meeting there was discussion about the need for these improvements under the host fee 2A2, Expenses Borne to Design and Construct Repairs. He wanted the Petitioner's current position for ingress and egress issues along Hazel Dell at 106th Street.

Mr. Weiss stated they were provided for in Item 5A in the Commitments: "Martin Marietta shall construct at its expense acceleration and deceleration lanes and a passing blister, dedicated left turn lane and unimpeded through lanes and all entrances used for transport of raw materials from the real estate along 106th Street." And under D, they would furnish a bond to repair any damage done on Gray Road, 106th Street, or Hazel Dell. They were addressing all the expenses that would reasonably incur as a result of their activity and they had no issue with that.

Mr. Dierckman asked about 4A which was monitoring potential impact from Martin Marietta and the impact on the City's water supply.

Mr. Weiss stated that was covered in Item 4 in their Commitments. "Martin Marietta agrees to pay for the monitoring and activities proposed and the reports..." with the City Utilities Department.

Mr. Dierckman asked about #5, the expenses as determined by the Director.

Mr. Weiss stated that was covered in Item #3, Studies and Monitoring.

Mr. Dierckman asked Mr. Molitor about the legality of the host fee.

Mr. Molitor stated that the Indiana Planning and Zoning statute allows the Board to permit or require that Commitments be made by the Petitioner. The case law seemed to support a Commitment that was voluntarily made would generally be upheld. Commitments that were involuntarily made usually did not get to Court; they usually lead to denial of the petition, when the Board tried to impose a Commitment that the Petitioner is not willing to make. It is not clear whether a Commitment that was imposed without being voluntarily agreed to could be upheld. There was a problem with something called a host fee, because it appeared to be an impact fee. Under Indiana law there must be an Impact Fee Ordinance in order to impose an impact fee. It was difficult to advise. The Board could impose this fee without the Petitioner voluntarily agreeing to it.

Mr. Dierckman indicated in the Department's version that under 1A, section 1 in F, the only disagreement appeared to be in section E. All other changes in General Operational Commitments seemed to be acceptable.

Mr. Weiss stated that they objected to E and F because they related to the plant. Items B and C related to the subject property of this application. They objected to E and F because they related to off-site facilities.

Mr. Hawkins asked about the expense of the round-about at 106th and Hazel Dell. He did not see anything in the Commitments that addressed the trucks coming off 106th onto Hazel Dell.

Mr. Weiss stated that he did not think the Department was in favor of a round-about at that location, therefore there was no Commitment. They had indicated they would pay for their impacts on all the roads, making passing blisters and ingress and egress lanes.

Mr. Hawkins asked about the possibility of putting in a temporary light for the next 3 to 5 years.

Mr. Dobosiewicz indicated that it had not been explored.

Mr. Weiss stated that without the regard to any written Commitment, if something made sense and the City approached them, they would be reasonable. Safety was important to them. They had suggested going to 96th Street and then north to avoid the 106th intersection.

Mr. Dobosiewicz stated there was no haul route identified in the Commitments.

Mr. Hawkins asked if there was a Commitment to adopt the Mining Ordinance if it was passed or would they be operating under these Commitments.

Mr. Weiss stated that there is a draft ordinance. At the last Land Use & Annexation Committee meeting, there were four members of the City Council present for the discussion. Three of the four indicated they were not going to proceed with that ordinance, because essentially what the remonstrators wanted they believed was unreasonable and unenforceable. They felt that to adopt an ordinance that was unsatisfactory to the remonstrators was not going to do much good. Martin Marietta had committed to try to work through the process. The ordinance would be a legislative act and without knowing what it says and how it will govern, they do not know what they would do in respect to it. They do not know if an ordinance will ever be passed. They have consistently indicated to the Department that they would cooperate in all reasonable requests.

Mr. Phears indicated that the Commitments were more restrictive than the ordinance. They had voluntarily cut their hours of operation. Much of the focus of the ordinance was on blasting and that does not occur in this petition. They could not cut the hours of the Carmel Sand Plant to go along with these Commitments.

Mr. Hawkins asked Mr. Molitor if it made sense to try to incorporate the mining ordinance or was that something the Board should not be concerned about at this time.

Mr. Molitor stated that the difficulty with trying to incorporate the ordinance was that it was an unknown quantity. That was like asking for a blank check. If there were features of the ordinance that the Board felt were important enough to be included into the Commitments and they were not there, it may be that the staff could look at the ordinance one more time to see if there was something missing. That would be one thing that could be done if the Commitments were sent to committee and put off for one more meeting. He was not necessarily recommending that, but the Petitioner cannot be asked to make a Commitment that is not in writing.

Mrs. Torres asked the Petitioner to address the comments and recommendations by Mr. Molitor; Item #2 the Commitment of Martin Marietta regarding Mueller and the wording.

Mr. Weiss wasn't sure who Mr. Molitor was advising. Mr. Hawkins had asked the last time if they would commit to not seeking damages as a result of an involuntary taking, based on the granting of this petition for sand and gravel and a subsequent denial of limestone extracting on this property. They had agreed to that. Mr. Molitor's comments seemed to go beyond that and ask them to indemnify the City and BZA for things that are not relevant. It seems each should be responsible for its own actions. They did not ask the Board to be obligated to issue a permit for one of their other applications based on the granting of this application and would not seek damages. That was different from suggesting that Mueller had no other rights for reclamation use of this property. They do have the right to seek a permit and that permit to be considered by the appropriate Board.

Mr. Phears stated that was in 13R in the City's Commitments. The Commitment provided by Mr. Molitor was broad. If the Mueller's came in later, after the mining was through, and wanted to put an office building there that was permitted under the current zoning and it was turned down then they wouldn't even have the right to bring an action against the City. They would have to indemnify the City for turning them down for a Use that was allowed in the zoning district. All they were trying to address in 13R were zoning issues. They would not claim that this was a taking because the Board's vote had rendered the real estate unsuitable for anything else.

Mr. Weiss stated that Mr. Molitor was seeking in #3 to make the effective date and expiration date for 99 years. Their Commitment was to be out in seven years and to have a reclamation plan and bond to support that. These Commitments should go away when their permit goes away and they have completed their reclamation. The binding effect was not dissimilar to theirs and they would not oppose it. Everyone has worked quite hard. They had been working on this petition since last August for their application to be considered favorably. They had provided evidence on each of the five criteria of the Ordinance. The evidence presented by the Remonstrators had been based on evidence outside the Ordinance, such as blasting and impacts that they perceive. They had done everything they could to address all the legitimate concerns. They were in compliance with the Ordinance. They had set forth a proposed Statement of Commitments that goes above and beyond that which is contemplated by the Ordinance. They intend to continue to be a good corporate citizen. The decision comes down to, in part, what is right and wrong and what is appropriate under the Ordinance. They ask that the Board consider this dispassionately, based on the evidence.

Mr. Weinkauff interrupted to state that he wanted the Petitioner to answer the questions of the Board members and not re-lobby the whole Petition.

Mr. Dierckman asked if under Section 6, site access improvements, they would agree to add an item F and say that "Martin Marietta will use the current 96th Street exit for not less than 50% of all traffic created by the use outlined within this document." The Board was trying to reduce the concerns for the use on 106th Street.

Mr. Weinkauff stated that from the minutes of the last meeting, Mr. Phears stated that on the traffic issue his client was willing to go to the 96th Street entrance and use only that entrance. They would ask the Planning Staff and Engineering to give the authority to allow an additional access point upon appropriate traffic arrangements being made. That would eliminate 106th Street and Gray Road truck traffic.

Mr. Phears stated that the Staff did not want to do that.

Mr. Weiss stated that they would add 6F.

Mr. Dobosiewicz asked for clarification. Traffic would exit on 96th Street, go east and then north on Hazel Dell.

Mr. Dierckman stated that he did not care if it went east or west on 96th Street. He felt most trucks using the 96th Street exit would be heading south.

Mr. Dobosiewicz stated that everything gets processed at Carmel Sand Plant.

Mr. Dierckman hoped that the plant would be moved in the future applications.

Mrs. Plavchak wanted confirmation on the Section titled "Host Fee", #2 expenses borne to design and construct repairs and improvements. If the improvements part was scratched and the repairs part kept, the constant truck traffic would require repairs to Hazel Dell, 106th Street and Gray Road sooner than normally required.

Mr. Phears stated that was included in Item 6 under future repairs that would be necessary.

Mr. Dobosiewicz suggested that the Board could require a haul route.

Mr. Weinkauff asked for the Remonstrators' position on the Commitments and what type of Commitments they would like to see if this Petition was approved. He understood they were still hoping it would be denied.

Mr. Dierckman asked for a time frame.

Discussion followed.

Mr. Weiss pointed out that the Petitioner had never been given an opportunity to speak about the Commitments. They had only responded to the questions that had been asked. They also wanted to be given the opportunity to respond.

Mr. Weinkauff preferred to give the Petitioner the opportunity to respond in the form of Rebuttal. The Remonstrators were given an hour and five minutes, like the Petitioner had to answer questions. The Board would take as much time as needed for the Rebuttal and further questions. He asked the Board members if they had any questions regarding the Remonstrators' Commitments.

Mr. Molitor recommended a five minute recess while one of the Board members was away from the dais.

Recess was taken.

Mr. Weinkauff stated that he would follow the same procedure as he did with the Petitioner's proposed Commitments and ask Board members for any questions and a brief presentation of any items not covered.

Mrs. Plavchak appreciated the fact that the City provided a separate document that itemized exactly the differences between what the Applicant proposed and what DOCS proposed. She recommended the Remonstrators come up with a similar document showing how theirs differed from the City's, so it would be easier and there would not be overlap.

Mr. Thrasher responded that they had received the document tonight so had not had time to prepare a document.

Mr. Weinkauff stated that at the last meeting both the Petitioner and Remonstrators were asked to present their ideas on Commitments and have the Department review those and make their recommendations. It was hoped that the parties could get together and hammer something out relative to Commitments. Obviously that was not accomplished. Ultimately that would be the best situation. Mr. Molitor had suggested that a two-member Board committee could meet with the Department, Petitioner and Remonstrators.

Mr. Dobosiewicz felt they should try to plow through it. At the beginning of the meeting, he did go through the Commitments and indicated to the Board whether or not he felt it was something contained

within the Department's review. The Department received them last week. The first three pages were items the Department felt were inappropriate for inclusion, what they labeled as water quality. With questions they might be narrowed down.

Mr. Weinkauff stated that in his reading of the Petitioner's Commitments, he had highlighted quite a bit of material on pages 2 and 3. However, Mr. Dobosiewicz stated that pages 1, 2 and 3 of the Remonstrators' Commitments were not pertinent.

Mr. Dobosiewicz stated that they were pertinent. He thought that Mr. Thrasher felt that the Water Utility was ill-advised or ill-prepared to address the matter. He would take his case to Mr. Duffy and set down with him to discuss his concerns that may have been above and beyond the Water Utility. However, the Director of the Water Utility, Mr. Duffy, has indicated that they are confident and comfortable with the Petition as it stands. The Department would look for the Utility Director's satisfaction with the Commitments, not Mr. Thrasher's.

Mr. Thrasher stated that he thought he could get through the items that were different in five or six minutes and then that would generate some questions. With regard to Commitments for water quality, he thought they were the Commitments offered by the Water Utility. He converted them into declarative statements that were in the form of Commitments. He found some differences. On page 3, #9, 10, and 11 were not dealt with in the DOCS proposal. There was language about monitoring, but he did not find any where what to do after the monitoring revealed degradation in water quality or threat to the water quality. Their Commitments formed an action plan on what to do if the monitoring plan does disclose an actual problem. In the Commitments regarding real estate on page 3, #1 was a reference back to the M-1 Manufacturing District performance standards. If those performance standards were good enough for manufacturing in Carmel, they should be good enough here. Yet DOCS chose not to support that. The performance standards deal with noise, vibration, dust, glares and things like that. Numbers 2 and 5 had been taken care of. Numbers 3 and 4 had been discussed. Number 6 was a request to move the Carmel Sand Plant and they understood that was in litigation. That problem could go away with the cooperation of the Board, Martin Marietta and the Remonstrators. If the case were dropped, the appellant could re-file and if all sides were agreeable to moving the sand plant, the time spent in administrative approvals would be fairly limited. Depending what happens to the sand plant, #7 may go away. Number 8 had been dealt with. Number 9 on page 5 was about the reclamation plans. No one was quite sure what they will find under the surface of the earth and they may want to change their reclamation plan or DOCS may grow unhappy with the proposed plan four or five years from now. This item would give the DOCS the power to make a change in the reclamation plan without necessarily having to come back to the Board. Numbers 10 and 11 were a long way of saying that letters of credit, bonds, insurance policies, cash, whatever held in the hands of a financial institution needed more description from the Board telling DOCS exactly what to ask for. When Martin Marietta does not like what they were being asked to do, there was a dispute. In Number 11, they were giving DOCS the right to draw down on the letter of credit or bond to cure breaches or defaults by Martin Marietta in the future. It would take the financial hit off of the taxpayers. Number 12 had been dealt with. He would like to see some review of plan changes, plans are always changing. Numbers 13, 14 and 15 were okay. Number 16 wanted a copy of the lease for more information about the relationship between Mueller and Martin Marietta. Looking at the Commitments Amended by DOCS, with respect of the tying together of the Ordinance and the Board's decision, that would be impossible because there is no Ordinance to work with. Item 1C did not strike him as a Commitment. Item 1E was objected to by Martin Marietta because it involves the Carmel

Sand Plant. In their own petition they involve the Carmel Sand Plant by saying it is going to be the source of processing. Number 2 was new to him, so he did not comment. In 3A, Reports and Comments he would insert prior to “commencement of any work on the real estate” the words “and at all times during the work.” So that the obligation to maintain permits from governmental authorities would not expire the minute they start, but would continue during the period of work. In D there was no time frame for the movement of Blue Woods Creek. There was a reference in the middle of D that Martin Marietta would provide as-built plans to appropriate parties. He felt the appropriate parties should be defined. This would be reviewed by others in the future. Later in that paragraph it said that a copy of the maintenance agreement would be provided to the City – what maintenance agreement? At E the maps, submittals and undertakings in the TAC responses should be defined. In the third line was attached an exhibit of the master list of maps and submittals. His copy had no such attachments. The Remonstrators would prefer all access to be off 96th Street, rather than 106th Street. That would be helpful by eliminating truck traffic and noise and make 106th Street safer. In water monitoring, Martin Marietta was agreeing to pay for the monitoring that they do. They were not agreeing to pay for any monitoring that the City did. So depending on what was done with the host fee, which was intended to cover that expense, the Board might want to revisit this and have Martin Marietta pay for all of the water monitoring. They would be the cause of the problem, so they should be the solution. The Board does not want to lose the host fee and lose this reimbursement. In 6C, some minimum and maximum time frames are needed to repair the roads. In D, “Martin Marietta shall provide a bond in form” and he would insert the amount. The more complicated problem was figuring out how much damage was done to the streets by Martin Marietta. If it was not proven, then it could not be collected. Maybe a fixed amount agreed upon up front would be better. Item E was okay. In Item 7 he was disturbed by the last sentence which shows up twice, “Martin Marietta shall be entitled to reserve a corridor in the right-of-way for accessing Mueller North property.” He doesn’t know what a corridor in the right-of-way could mean, unless it was a gap in the right-of-way which is a private street. It would be a 20-foot swath maintained privately. He felt that should be struck because it would be problematic for insurance liability, curb cuts, and jurisdiction. They would have a way under 106th Street for underground mining. With respect to street cleaning, that was ambiguous because a street is never clean, but they could remove excess sand, gravel, stone and debris. In Buffers and Screening, Items A and B were okay. In C all landscaping shall be completed consistent with the conceptual landscaping plan map. Those things can change; it would be nice to have some cross reference for a date or author or a job number such as a map would be referenced. On environmental, many of the same comments. Item #10 looked like J, “Martin Marietta shall maintain an approved spill.” Who would approve them, DOCS, Fire Department? Same with storm water management, who would approve it? It would be nice if Martin Marietta knew to who they had to submit the plans. Under L, third line down, it said “initially Martin Marietta proposes to install strobe safety lights on all of its equipment.” He did not feel that would cover it. It should be theirs and other’s equipment on the job site as there would be private contractors. He felt reclamation should be much more detailed and flexible at the same time. At the bottom of page 8 it said “unless an alternative reclamation plan was approved.” It didn’t say approved by whom. There was a reference to 3 to 1 slope with 80% grass on all side slopes and a minimum of six inches top soil to be placed in the areas to be seeded. He would ask that the six inches of top soil be placed in the pit, not just on the side slopes. He pointed out in O that the Indiana Mineral Aggregates Association is Martin Marietta’s trade association, so they were probably helping to write the guidelines. The DOCS should have some power to over-ride that and change it to make it more reasonable. Item P was okay. Binding Affect was okay. At R he felt that Mr. Molitor had done a fine job and that Martin Marietta did not meet the spirit or word of the last hearing in this regard. In Martin Marietta’s proposal, in the third line, there was a qualifier that said, “by virtue of the grant of this

Special Use permit.” That means, unless the lawsuit was based on this Special Use permit, there was no waiver.

Mr. Hawkins asked Mr. Thrasher about his concern with the lease.

Mr. Thrasher stated there were a number of things. The rights of Martin Marietta to do what they were proposing to do as opposed to the Board or DOCS and the Petition relying on the Mueller family to do something. Second concern was the rights of either party to terminate the lease voluntarily. All these representations were being made by Martin Marietta, who is in the business. It is a control issue and he was curious about the lease.

Mr. Hawkins asked Mr. McEvoy about his letter stating the cost of moving the plant had gone from one million dollars to 2.5 million. He wanted to know if Mr. McEvoy got this information from a Commitment expressed by Martin Marietta.

Bill McEvoy, 5120 Williams Circle, President of Kingswood Homeowners Association. Two years ago when the application to move the plant from its current location to the east side of Hazel Dell was discussed, the figure at that time was one million dollars to move the plant. Now it is 2.5 million and he would like to see that justified.

Mr. Phears stated that gentleman no longer worked for Martin Marietta.

Mrs. Torres asked Mr. Dobosiewicz about his comments on Mr. Thrasher’s document on page 3 that the Department would not be in favor of #1 and she was unclear as to why the Department would not be in favor of that.

Mr. Dobosiewicz stated they were attempting to apply standards that weren’t applicable to the real estate. They had addressed the review of the petition and the M-1 standards.

Mr. Dierckman had questions about page 3, paragraphs 9, 10, and 11 for Mr. Dobosiewicz and Mr. Molitor. He thought they were comfortable with John Duffy’s suggestion that he was comfortable with the Commitments as outlined by Martin Marietta.

Mr. Molitor stated that he believed Mr. Duffy was comfortable with the plans he saw that were submitted in June. He felt that Mr. Duffy was relying upon that document which was incorporated by reference into the Commitments submitted by Martin Marietta.

Mr. Weinkauff asked if it was the plan for all the monitoring of the water.

Mr. Molitor stated that in the Commitments there was a document referenced titled “Ground Water and Surface Water Monitoring Plan for Mueller Property South Sand and Gravel Operation, Carmel, IN” dated June 2004 and previously submitted to the Utilities Department. As he understood it, Mr. Duffy was comfortable with that document. They could repeat everything that was in that plan and put it into the Commitments, but he thought that was not necessary since it was attached.

Mr. Thrasher challenged the date. In his document on page 1, there were two direct references to monitoring plans that were not the reference that was in the Commitment dated June. He had prepared

his information off Commitments that were provided to him from Mr. Duffy at a date much later than June. Mr. Duffy wasn't really happy with the June stuff when he prepared the Commitments that Mr. Thrasher had rehashed.

Mr. Molitor stated that may be the case, as he was not speaking for Mr. Duffy. He was asking DOCS if Mr. Duffy had signed off on that plan.

Mr. Thrasher stated that Mr. Dierckman's comment had to do with water quality and enforcement. Mr. Thrasher did not believe that it was in any monitoring plan. So if Mr. Duffy was happy with a monitoring plan, it still did not answer Mr. Dierckman's question.

Mr. Weinkauff asked for those dates and plans. He had not seen a monitoring plan from Mr. Duffy. It may be in the material he has in his files. He stated that the Remonstrators had concerns about water monitoring. It was one thing to pay for all the studies, but his concern was who was going to pay to fix the water supply if something did happen. He would like to see Mr. Duffy's proposal and a comparison with the Remonstrators' concerns.

Mr. Dierckman stated that they do have a copy of the plan and he was comfortable with John Duffy's recommendation. Mr. Duffy had attended the last two meetings. Mr. Dierckman's question was more about the implementation in paragraphs 9, 10, and 11. He wanted the Petitioner just to specify how that was dealt with within the water plan or the proposed covenants.

Mr. Phears stated that the monitoring plan was the subject of long discussions in the meetings with Wittman, Mr. Duffy and Mr. Hensley. There is a time-of-travel issue. Water does not go immediately from one pond into the well. The time of travel is six months or longer than a year. The monitoring program was designed at the pond, which is essentially an early warning system. This means there will be a long time before anything hits the wells. Something picked up at the monitor would not affect the well overnight. The monitoring is above and beyond what the State and City require for water quality standards. The description in #5 was shorter language of many of the items described in Kingswood's comments. The Ground Water and Surface Water Monitoring Report was dated June 2004 and was on Exhibit B "List of Binding Submittals". It contains detail on all of this. Mr. Duffy had stated that he was comfortable with the report and he has the power to shut them down if something degrades the water supply.

Mr. Dierckman asked if there were Federal laws, as well as State law, that have protective measures. It might be better if the EPA took their measures at their expense, if there were any issues.

Mr. Phears stated there is a Clean Water Act and there is a delegation of the Clean Water Act Indiana Agency to enforce it.

Mr. Dierckman wanted clarification that Item #B6.

Mr. Weinkauff stated that the Board did not get copies of the various binders as part of the Commitments.

Mr. Dierckman stated that these items were in the materials that had been provided to them over the months.

Mr. Phears agreed that was a good point. The documents embody the detail that Mr. Thrasher would like to see in the Commitments. The Commitments would be the size of "War and Peace". That was the reason for the list of Exhibits.

Mr. Dierckman wanted to know if Item #B6 on the proposed language by the Remonstrators was for the existing sand plant.

Mr. Thrasher indicated that was correct.

Mr. Dierckman thought paragraph 9 on page 5 was a plan for bonding and deposits that was already taken care of in the City's processes.

Mr. Thrasher stated that in the new document it was paragraph 10, Details on Bonding.

Mr. Dierckman felt this project did not need this kind of detail.

Mr. Dobosiewicz stated that certainly the City has a process for bonding. This language brought detail that the Petitioner was asking for and the Department was not opposed to the language. The City accepts bonds on a regular basis. There should be a suitable document that would be satisfactory to the City and the Petitioner.

Mr. Dierckman felt they should follow the City's standard operating procedure.

Mr. Molitor stated that the standard for accepting bonds was covered in the Subdivision Control Ordinance. This was not a subdivision and it is true it was not covered in the Ordinance for Special Use approval. The Staff typically dealt with bonds.

Mr. Dierckman asked the Petitioner to adhere to the requirements as outlined in the Subdivision Control Ordinance.

Mr. Weiss stated that they would prefer that over the proposal by Mr. Thrasher that says the Department could pull the Petitioner's security at any time without cause. They would follow the standard procedure by the City of Carmel.

Mr. Molitor agreed that it adequately followed the same type of language as the Subdivision Control Ordinance and that it would work.

Mr. Thrasher stated that the Subdivision Control Ordinance has specific amounts and timeframes that do not match these circumstances, so he felt it could not be adopted wholesale.

Mr. Phears stated that the language in 11P of the Department's version was drafted to give the Director broad discretion. The Director can pick an appropriate amount in some reasonable way tied to reclamation. They bond reclamation in dozens of states and it was not unusual for them.

Mr. Dierckman ask Mr. Hollibaugh, the Director, if he was comfortable with that language giving him that discretion or would he rather have one of the documents referenced in that paragraph.

Mr. Phears pointed out that it also gave the Director the power to increase it from time to time if necessary. They were comfortable giving the Director discretion.

Mr. Dierckman just wanted to make sure that all the levers were in place to enforce if and when it became necessary and that the current process would work if needed. He wanted to know if Item 16 on page 6 “Right to sell or transfer real estate mineral rights, lease hold rights...” was in lieu of the binding effect.

Mr. Thrasher stated that was the new 17 and they had no problems with that one. He wanted to know if the monitoring plan included a containment plan. How would they deal with a monitoring well if there was a problem and what was the plan?

Mr. Dobosiewicz stated that the City has authority whenever there is a threat to the water supply. In the discussion with Mr. Duffy on the items referenced in #9, 10, and 11, the City has existing codes and ordinances in place to deal with threats to the water supply. There would not be a special way to handle any threats in regards to this project. They would use all means available through existing codes and ordinances.

Mr. Thrasher asked about who would pay if there was some liability.

Mr. Phears stated that could not be done in an ordinance, but would be a matter for the State legislature to decide. If they degraded the water supply, they would be responsible.

Mr. Dierckman asked about page 7 item 7 “Compliance with Thoroughfare Plan” in the Department’s document regarding reserving a corridor.

Mr. Phears stated that in this document they were giving their property away. They did not want to give it away and not have a corridor in their own right-of-way. It was a curb cut, driveway or right-of-way access.

Mr. Weinkauff thanked the Board for their well thought-out questions and offered the Petitioner time for rebuttal.

Rebuttal:

Mr. Phears stated that it was important to remember that Martin Marietta stays liable for complying with these comments, but not through the lease. The Commitments bind them. Terminating the lease does not get them out of a Commitment.

Mr. Weinkauff asked if there was a problem giving the Department a copy of the lease as a matter of public record.

Mr. Phears stated that because of trade secrets one would not be provided. Typically the applicant files a memorandum of lease for the record.

Mr. Weinkauff requested them to file the memorandum of lease for the record. He was not going to appoint a committee to work on the Commitments to be able to make a motion in the affirmative. He wanted the Board to be able to vote on a final document put together by the parties involved: the

Petitioner, the Department of Community Services and the group of Remonstrators.

Mr. Dierckman did not feel the parties would ever get together on anything that would be acceptable to all three of the parties. He felt the Commitments that were outlined and drafted by the Department, with the modification, were relatively reflective of tonight's discussion. People could make comments or modifications on his notes. It did not appear they would be able to get Part 1, Section 1, paragraphs E and F. It did not appear they would be able to get the host fee because they did not have legal grounds.

Mr. Weinkauff stated that according to Mr. Molitor, if the Petitioner volunteered a host fee, it would stand.

Mr. Dierckman stated that under Reports and Permits, Mr. Thrasher had a good comment relative to the new section 3A. It stated that prior to the commencement of any work on the real estate and he would add "during the period of work". Under D and anywhere there were the words "appropriate parties", DOCS would also be copied. The definition of TAC is Technical Advisory Committee and that can be spelled out. On page 7, F had been added about 96th Street and traffic.

Mrs. Torres added that on page 6, under 6C to define better "expeditiously" and put a timeframe on that.

Mr. Weinkauff wanted to go back to page 5. He wanted a routing situation that was agreed upon. He maintained that this type of truck traffic along 106th Street, turning left across lanes of Hazel Dell where lanes of traffic is going 45 to 60 miles per hour, was asking for some real problems. He questioned the Department being opposed to the 96th Street/Hazel Dell haul route. He felt it needed discussed and agreed upon.

Mr. Dobosiewicz stated the Department was not opposed to it. They had not examined its impact.

Mr. Hawkins stated that was one of his principal concerns. Would a temporary traffic light be a cheaper alternative or possibility? It could be monitored when it was triggered by truck traffic and then turn green for them to turn. Once the mine was done, it could be removed.

Mr. Dobosiewicz stated that the Board does not have the authority to require it. They could require them to seek the approval of the City.

Mr. Dierckman liked the idea of using 96th Street because there is a light there.

Mr. Weinkauff stated that there is a light at the Martin Marietta entrance on 96th Street and also one at 96th Street and Hazel Dell. Both egress and ingress would be managed and they would not need to cross 106th.

Mr. Phears stated it might be better for the outbound trucks to use 96th Street and the inbound ones to use 106th Street.

Mr. Weinkauff stated the trucks would still need to turn left to go onto the property.

Mr. Dobosiewicz stated the Department did not have a problem with that movement, southbound on Hazel Dell, west on 106th and then into the site and exiting from 96th Street.

Mr. Hawkins stated he was in favor of it also.

Mr. Weinkauff stated that it had been estimated the rate could be a truck per minute. That would be a lot of traffic close to homes. They would be turning left and crossing eastbound traffic on 106th Street.

Mr. Dobosiewicz stated that if all access would be restricted to 96th Street then the City would not get any improvements at existing entry points into the facility that don't have excel, decel or passing blisters.

Mr. Weinkauff did not think the improvements would be needed if the truck traffic was restricted.

Mr. Dobosiewicz stated they were discussing truck traffic relative to this Use.

Mr. Phears stated they would use 96th Street. Then the 106th Street improvements and dedications would go away because they would not part of this Use.

Mr. Thrasher stated the Remonstrators would be in agreement with the 96th Street entrance and exit for 100% of the traffic.

Mr. Dierckman said that he was not taking out the 106th Street improvements.

Mr. Phears stated that at this point they were unrelated to the project.

Mr. Dierckman wanted to know which section contained the 106th Street improvements. He was told 6A (by someone off microphone).

Mr. Dobosiewicz stated that it was being suggested that 6A would be eliminated and they were also proposing to eliminate 7. The Petitioner was also committed to provide a 10-foot multi-use path within the right-of-way of 106th Street along the edge of the property. He would not suggest they eliminate dedication of the right-of-way pursuant to the Thoroughfare Plan. Item 6A was about existing access points into the area where there was less improvement than the Department would like to see at the locations along 106th and Gray Roads.

Mr. Phears stated they would agree to keep #7 as drafted by the Department.

Mr. Dierckman wanted added under Street Cleaning that the real estate would be "cleaned from all soil, sand, gravel, stone and debris."

Mrs. Plavchak felt "debris" was too general.

Mr. Phears stated they had given the Director broad discretion and the Board may not want to limit that discretion.

Mr. Dierckman stated they would put in those words. It would not be limited to those words but

include those words. Under Binding Effect, he felt Mr. Molitor's version should be used because it was more inclusive. He asked Mr. Thrasher if he was more comfortable with Mr. Molitor's Binding Effect wording.

Mr. Thrasher agreed. They were happy with the removal of trucks from 106th Street. They would like the plant moved. That would keep the trucks from going up Hazel Dell, but the cross-over would still be needed in the median.

Mr. Phears stated that the turn lanes were still in the Commitments for Hazel Dell. There are currently no left turn north-bound lanes.

Mr. Dierckman indicated he could go back through the changes for the motion.

Mr. Weinkauff would be more comfortable if the document was prepared for the next meeting. It could be prepared by the Department and available one week in advance for review.

Mr. Hawkins asked if they were using the Department's 13R or Martin Marietta's 12B.

Mr. Dierckman stated that he was using the Department's 13R.

Mr. Weiss indicated off microphone that he was comfortable with 13R.

Discussion continued regarding the version to vote on.

Mr. Dobosiewicz stated that the Board was in favor of the section on host fees. There was a lot of discussion on Items 1 and 4. Item 1 was expenses, including past expenses in the course of reviewing and commenting upon Martin Marietta's applications. The other was expenses, including past expenses for monitoring and potential impact of Martin Marietta's past and future operations on the City's water supply. Those two items stand alone. The fee that the City has collected for the review of this petition was a total of \$630.00 and the Department had probably spent close to \$60,000 to \$65,000 to date in consulting fees. That was not John Duffy's Utility Department expenses they have borne in taking further measures to review the petition. This was to give the Board at least one aspect of Section 2 that the Department was proposing the Board might take into consideration when adopting a proposed set of Commitments, not Conditions. If Martin Marietta would be unwilling to make that as a Commitment, the Department would still request that it be a condition of approval.

Mr. Phears felt if they continued these Hearings, they would never get done. He suggested the Board could vote the Petition either up or down. They would then have the opportunity to approve the minutes. A part of the approval of the minutes would be to have the opportunity to approve the document when it comes back attached to the minutes. If it did not meet what the Board voted on, then the Board could deal with that at the next hearing. There was a court reporter present who was taking it all down. A vote was the only way to bring closure. If Mr. Dierckman had a marked version that could be initialed, that could help. He felt there were small changes.

Mr. Weinkauff and Mrs. Torres also had marked versions.

Mr. Hawkins asked if there was a possibly to give tentative approval subject to the final document.

Mr. Molitor explained that once the Board approves the Petition, it gives up jurisdiction of the matter. The Board could approve the Special Use with the Commitments based on the discussion tonight and have the Commitments subject to review and approval by Mr. Molitor or Mr. Molitor and the Staff. He would prefer that the Board have the whole document in front of them at the time they approve it.

Mrs. Torres would prefer to see a nice clean version of the Commitments.

Mr. Weiss stated they would have no problem with the Board retaining jurisdiction so that each member could see the revised copy that Mr. Dierckman marked up, so that they could say, "Yes, this is it."

Mr. Molitor stated that once the decision was made, jurisdiction was lost.

The Board discussed that they each have marked up copies.

Mr. Molitor stated that the Chair could appoint a committee of two to review the final draft with him and the Department in two weeks. Then there would be a final document prepared for the Board's review a week before the December 13 meeting.

Mr. Phears stated that he thought Mr. Molitor stated that the Board could approve the Use subject to the presentation of the Commitments for approval at a subsequent meeting.

Mr. Molitor stated that a committee could meet two weeks from today to agree to the final version of the Commitments. Then the final version of the Commitments, along with approval or disapproval, could be scheduled at the meeting on December 13. Once the Board has made a decision, it loses jurisdiction of the matter and it cannot change its mind as to what it has done.

Mr. Weiss stated that these were minor changes that the Department or someone could make in the next day or two. It would not need a committee. They could have them distributed through the Department to the Board members. If there was something else, that would be different.

Mr. Thrasher heard an area of disagreement that had not been resolved and that was reimbursing the City for at least \$65,000 and for continuing monitoring costs over and above what had been volunteered.

Mr. Phears stated this was the first they had heard this amount and if there was not a vote tonight, they could go back to the Department about it.

Mr. Thrasher stated that he was authorized to make a settlement offer.

Mr. Weinkauff stated that had nothing to do with the Board's decision.

Mr. Molitor suggested that the Board could take a five minute recess to allow the discussion between the Remonstrators and the Petitioner.

Mr. Dierckman was uncomfortable with talking about reimbursement for cost before and that being part of the vote.

Mr. Weinkauff repeated what Mr. Dobosiewicz had said that it was one of two things. It could be classified as a Commitment which came voluntarily from the Petitioner or the Department would more than likely ask the Board to consider a condition as part of approval. The Board does not have to follow that condition.

Mr. Hawkins moved to recess for five minutes, seconded by Mrs. Torres.
Mr. Weinkauff recessed the hearing for five minutes.

Mr. Thrasher stated they had agreed to get together as soon as possible, which would probably be December 4 or 5. Then they would have something in writing for the Board on December 13.

Mr. Weinkauff stated that the Board wanted the City to draft the final document and the Remonstrators and Petitioner could get together with the City. A decision would be made after the Board reviewed that document.

Mr. Molitor suggested that he and the Staff could work with the two opposing sides, but something needed to be delivered to the Staff by December 3 in order to get it to the Board for the December 13 meeting. Failing such delivery, then he and the Staff should be given authority to draft a set of Commitments to reflect tonight's discussion.

Mr. Weinkauff stated that if there was no objection by any Board member and it was clear to both parties then that was what would be done.

Mr. Dobosiewicz stated that no information would be delivered to the Board later than the 8th of December because that was the date that the Department Report comes out for the meeting on December 13. They would like to get it out with the Agenda if possible on December 3. December 4 and 5 that Mr. Thrasher suggested are Saturday and Sunday.

Mr. Weiss stated they would like to proceed as described. They had talked to the Remonstrators, but from Martin Marietta's perspective they would like to have the Statement of Commitments revised consistent with today's comments. If DOCS could do it, that would be great. They could come to the December 13 meeting with the expectation of having a vote. In between they will listen to the Remonstrators and try to work something out.

Mr. Weinkauff stated this was a City issue, not an issue just between Kingswood Homeowners Association and Martin Marietta. If prior to the draft being finished, either party had something they agreed upon as part of the document and the Department was in agreement with it, it could be included in the Commitments.

Mr. Dobosiewicz had a question with regard to expenses, including reviewing and water monitoring. Should he leave any of that out or propose a change for Commitment or address it as a condition of approval.

Mr. Weinkauff felt as Chair he had made it reasonably clear based upon Mr. Dobosiewicz's comments that there were two ways to go about this. One was a commitment basis and if they were willing to make some type of Commitment that would make it easier. They needed the opportunity to come to the Department with that type of Commitment. If they were not willing to make it a Commitment, then the

Board would have to consider it a condition.

Mr. Molitor stated that would work fine. They could postpone again the changes on the Rules of Procedure until January.

J. New Business.

1j. Proposed amendments to Article IX (BZA Rules of Procedure), Section 30.08: Alternate Procedure (Hearing Officer), and Chapter 21: Special Uses.

This item was **TABLED** to next month's agenda.

K. Adjourn.

Mr. Dierckman moved to adjourn. The motion was seconded by Mrs. Torres and APPROVED 5-0.

The meeting was adjourned at 11:00 PM.

James R. Hawkins, President

Connie Tingley, Secretary